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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ANJIE TAREK-KAMINKER

Grievor

and

TREASURY BOARD
(Office of the Director of Public Prosecutions)

Employer

Indexed as
Tarek-Kaminker v. Treasury Board (Office of the Director of Public Prosecutions)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Sean McGee, counsel

For the Employer: Joel Stelpstra, counsel

Decided on the basis of written submissions, filed November 12 and December 10, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Anjie Tarek-Kaminker ("the grievor") is employed by the Treasury Board (TB or "the employer") with the Office of the Director of Public Prosecutions

[2] On April 6, 2016, the grievor filed a grievance that stated as follows:

…

> ***Nature of Grievance***
>
> *I hereby grieve:*
>
> 1. *Management's decision to rescind the accommodation measures in place at Old City Hall since 2012 and for many years prior;*
> 2. *Management's failure to accommodate me and its harassing behaviour;*
> 3. *Management's contention that I owe leave credits (previously approved) due to my compressed schedule, as informed by Ms. Chris Gruppuso during our March 3rd, 2016, meeting;*
>
> ***Corrective Action Sought***
>
> *I hereby seek:*
>
> 1. *That management stay the operation of accommodation revocation pending the final determination of this Grievance;*
> 2. *That management accommodate my needs as per my several requests;*
> 3. *That the accommodation measures (in the form of telework and flexwork) established well before 2012 remain in place, be clarified and that the employer's obligations be adhered to;*
> 4. *That management refrain from demanding or recovering leave credits for the leave situation raised by Ms. Gruppuso on March 3rd, 2016;*
> 5. *That Management abide by their own policy on timekeeping;*
> 6. *That I be made whole;*
> 7. *Such other remedy that an Adjudicator may deem appropriate under the circumstances.*
>
> [Emphasis in the original]

[3] On October 13, 2016, the grievor referred her grievance to the Public Service Labour Relations and Employment Board (PSLREB) for adjudication. On that same date,

she also gave notice to the Canadian Human Rights Commission under s. 210(1) of the *Public Service Labour Relations Act* (S.C. 2003, c.2, s. 2), as it was then named, and s. 92(1) of the *Public Service Labour Relations Regulations* (SOR/2005-79), as they were then named.

[4] As of the grievance being filed, her terms and conditions of employment were partially governed by a collective agreement between the TB and the Association of Justice Counsel (AJC) for the LA Group that was signed on October 15, 2012, and that expired on May 9, 2014. Before that collective agreement, the grievor's terms and conditions of employment were partially governed by a collective agreement between the TB and the AJC for the LA Group that was signed on July 23, 2010, and that expired on May 9, 2011.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act*, and the *Federal Public Sector Labour Relations Regulations*.

[6] As of the hearing, the collective agreement in place between the TB and the AJC for the LP Group had been signed on November 7, 2018.

[7] The hearing was held in person in April of 2019 in Toronto, Ontario, and continued there in December of that year. It was completed in November of 2020 by videoconference due to the COVID-19 pandemic. The parties submitted a joint book of documents. At adjudication, in support of her grievance, the grievor led evidence about the practice of her religion, her family life, some health issues involving members of her family, and where she lived.

[8] After the hearing was completed, both parties provided the Board with a written copy of the outline of the oral arguments that had been made. In her written reply argument, the grievor sought an order, which had not previously been requested at any

time prior, for the anonymization of her identity. The employer objected to this request.

[9] On October 28, 2021, the Board rendered the decision in 2021 FPSLREB 120 ("the decision") denying the grievance, ordering specific exhibits sealed, ordering certain documents redacted, and dismissing a request to anonymize the original decision.

[10] On November 12, 2021, the grievor informed the Board that she intended to file an application for judicial review challenging the original decision before the Federal Court of Appeal. She also requested that pending the resolution of the judicial review application and any subsequent rehearing of her grievances, the original decision not be made available to the public.

[11] On November 26, 2021, the Board requested written submissions from the parties with respect to the grievor's request that the original decision not be made available to the public.

[12] On November 26, 2021, the grievor filed a "Notice of Application for Judicial Review" of the original decision with the Federal Court of Appeal. The Board's records show that she served a copy on the Board's Secretariat on November 30, 2021.

[13] On December 10, 2021, the grievor indicated that her November 12, 2021, letter contained her submissions on her request that the original decision not be made available to the public, and she restated the content of that letter.

[14] The employer declined to file submissions on the grievor's request that the original decision not be made available to the public. However, it stated that this should not be seen as an "… acquiescence to or concession of any of the arguments of the grievor in her submissions."

II. The grievor's submissions

[15] The grievor alleges that making the decision available to the public before the Federal Court of Appeal renders its decision on the judicial review would pose a serious risk to the proper administration of justice and to the privacy and dignity of her and her family. She refers the Board to *Sherman Estate v. Donovan*, 2021 SCC 25,

and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, in support of her position.

[16] It is the grievor's position that making the decision available to the public will pose a serious risk to the proper administration of justice, as it makes several negative assertions about her honesty, and as such, it is reasonable to assume that these assertions will follow her in her role as a Crown attorney. She states that the findings on her credibility in the decision will make it difficult to do her job and that this will cause significant repercussions to the Crown's ability to function on any file to which she is assigned.

[17] The grievor adds that the decision's findings about her were based on errors and were made in violation of her right to procedural fairness. She specifically takes issue with the fact that the Board drew adverse inferences from the production of documentary medical evidence and states that the parties had informed the Board and were in agreement that no adverse inference should be drawn from the mutual decision not to call that evidence. She states that the parties advised the Board that they had agreed that the doctors would have provided evidence that was the same as that combined in their letters. The panel of the Board disregarded or did not deal with this agreement, and if, as a result of her evidence, it had misgivings about her failure to produce the doctors or to comment on the manner in which the letters were produced, it did not communicate them to the grievor before drawing conclusions on her credibility. She alleges that this error, if it is made available to the public, will harm both her career and the work of the Crown. She submits that no other reasonable measure could prevent this risk.

[18] The grievor states that her request respects the proportionality requirement of the *Sherman Estate* test as she is not requesting a permanent confidentiality order but simply that the decision not be made available to the public before she has the opportunity to challenge it before the Federal Court of Appeal.

[19] The grievor also raises a dignity issue, relying on paragraph 33 of *Sherman Estate*, which states as follows:

> *[33] … A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the*

> *dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.*

[20] She states that the decision includes extensive information about her family that if released without challenge would pose a risk to her dignity and that of her family. In addition to *Sherman Estate*, she relies on the Board's decision in *Grievor X v. Canada Revenue Agency*, 2020 FPSLREB 74.

III. Reasons

[21] The test for any discretionary limit on court openness was reformulated in *Sherman Estate*. At paragraph 38, the Supreme Court of Canada set out the test as follows:

> *[38] … In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest:*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[22] At the first branch of the test, the party seeking a restriction on the court's openness must demonstrate that court openness poses a serious risk to an important public interest. These are distinct requirements, and the party making the motion is required to demonstrate both the important public character of the interest as well as the seriousness of the risk. Paragraph 42 of *Sherman Estate* states as follows:

> *[42] … In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.*

[23] The Supreme Court of Canada also stated that there is no exhaustive list of what constitutes an important public interest but that the expression "important interest" "… captures a broad array of public objectives." However, it did state that the important public character of the interest requires that it go beyond the interests of the parties.

[24] The jurisprudence has already recognized several interests that qualify as an important public interest for the purpose of the *Sherman Estate* test; these include the fairness of the trial and the proper administration of justice. A party alleging one of these interests need not re-establish the important public character of the alleged interest but rather must demonstrate how the alleged facts qualify as a threat to this important public interest.

[25] Therefore, the burden of proof will differ based on whether the case law has already recognized an interest as an important public interest or whether the party is alleging an interest that has yet to be recognized as such.

[26] If an interest as not been recognized as an important public interest for the purposes of limiting court openness, a party seeking such a confidentiality order must demonstrate the following at the first branch of the *Sherman Estate* test:

1) that court openness threatens an interest;
2) that the interest transcends the concerns of the parties and engages societal concerns or general principles; i.e., the interest is a public interest (see *Sierra Club*, at para. 55; and *Sherman Estate*, at paras. 41 and 43);
3) that the public interest is of sufficient importance to justify limiting the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)); and
4) that the apprehended harm is serious in that it is either very probable or very grave (see *Sherman Estate*, at para. 82).

[27] If an important public interest has already been recognized by the jurisprudence, a party need only show the following:

1) that the facts alleged demonstrate that court openness threatens the important public interest as recognized by the case law; and
2) that the apprehended harm is either very probable or very grave.

[28] Finally, in the specific case in which a party alleges that the public availability of information reported in a decision poses a threat to their dignity, as recognized as an

important public interest in *Sherman Estate*, the party making this allegation must show the following:

> 1) that the information consists of highly sensitive or intimate details about an individual; and
> 2) that the harm apprehended as a result of the public availability of the information is either very probable or has a high level of gravity.

[29] It is insufficient for a party to merely allege that an important public interest is at play; rather, the party must convince the decision maker that it is so.

[30] At paragraph 82 of *Sherman Estate*, the Supreme Court of Canada referred to paragraph 86 of *R. v. Mabior*, 2012 SCC 47, explaining that the more probable the apprehended harm, the less grave it needs to be, and vice versa.

A. Alleged risk to the proper administration of justice

[31] The grievor submits that her "… credibility is absolutely essential to her work as a Crown attorney …" and that the decision "… that calls into question her truthfulness will make it extremely difficult to do her job." She submits that this "… will cause significant repercussions to the Crown's ability to function on any file to which she is assigned." The alleged risk to the proper administration of justice, according to her, is her apprehension that the Crown's ability to carry its functions in any of the grievor's files will be affected.

[32] At best, this situation appears to be limited to matters on which the grievor may work personally. She offers no explanation, or even examples, of how "the proper administration of justice", as far as it extends beyond her personally, would be rendered unworkable by making the decision available to the public other than to make the broad assertion that she makes.

[33] Although making the decision available to the public may make it more difficult for the grievor personally to discharge her duties as a Crown attorney, it remains unclear how the public character of "the proper administration of justice" would truly be at risk in such a case. I note with interest that the employer did not offer any argument in support of her contention that making the decision available to the public would create a serious risk to the proper administration of justice.

[34] However, even if I were to accept that the grievor had established a risk to the public character of the proper administration of justice, nevertheless, I would find that

she has failed to establish that such risk constitutes a serious risk justifying limiting court openness. The risk alleged by the grievor is premised on a series of assumptions. She has not shown how the risk she alleges is either probable or very grave.

[35] The grievor alleges that the Crown's ability to carry out its functions in any file she is assigned will be impaired. There is a significant difference between the Crown facing difficulties in some files and making the grievor's Crown attorney role unworkable. The grievor has a burden to show a factual foundation in support of the probability of her contention, which she failed to discharge.

[36] In addition, the grievor failed to illustrate the causation she alleges. She alleges that making the decision, which makes findings about her credibility, available to the public will cause the significant repercussions but offers no factual foundation in support of the probability of the assertion.

[37] *Sherman Estate* states that the seriousness of a risk is assessed in light of both the gravity of the anticipated harm and the likelihood of its occurrence. The Court also states that the assessment cannot be founded on apprehension alone; paragraph 97 states as follows:

> *[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*[A.B. v. Bragg Communications Inc., 2012 SCC 46]*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. **An inference must still be grounded in objective circumstantial facts** that reasonably allow the finding to be made inferentially. **Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (R. v. Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).***
>
> [Emphasis added]

[38] The grievor's allegation that the proper administration of justice is seriously at risk relies on a series of assertions that she does not ground in objective circumstantial facts, namely, these:

1) that making the decision available to the public will in all likelihood harm her credibility in the eyes of defence counsel and judges before whom she will appear as a Crown attorney;
2) that the impact on her credibility as a Crown attorney will make her job unworkable; and

3) that the impact on her credibility as a Crown attorney will make it unworkable for the Crown to proceed in any file she is assigned.

[39] While *Sherman Estate* recognizes that logical inferences may be drawn from objective circumstantial facts, the grievor's contentions are not based on objective circumstantial facts and amount, in essence, to mere apprehensions, against which the Supreme Court of Canada has warned. Accordingly, the grievor has failed to demonstrate a serious risk to the proper administration of justice within the meaning of *Sherman Estate*.

[40] With respect to the grievor's argument that the credibility findings reported in the decision are in error and that they resulted from a violation of procedural fairness, those are concerns to be raised before the Federal Court of Appeal as part of the judicial review, and they are not relevant to the test in *Sherman Estate*.

B. The alleged risk to the grievor's dignity

[41] The grievor has submitted that the information reported in the decision poses a risk to her and her family's dignity. The question for the Board to answer is whether the grievor has demonstrated that the information she seeks to protect is, in the Supreme Court of Canada's words, "biographical core" information, meaning the following: does it contain highly sensitive and intimate details about the grievor or her family?

[42] At paragraph 73 of *Sherman Estate*, the Supreme Court of Canada stated that "… protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test." In the context of *Sherman Estate*, dignity is specifically defined as the ability to "… present core aspects of oneself to others in a considered and controlled manner …". Therefore, dignity is harmed when a person loses control over highly sensitive information about themselves. This definition of dignity is significant because it is a far broader concept that "… finds expression in almost every right and freedom guaranteed in the *Charter*" (from *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 166). In the realm of court openness, dignity must be understood considering this definition.

[43] To demonstrate that an individual's dignity is at play in the context of court openness, the party seeking the confidentiality order must satisfy the requirement that

the information consists of "… intimate or personal details about an individual …", what the Supreme Court of Canada has described in its jurisprudence on section 8 of the *Charter* as the biographical core (see *Sherman Estate*, at para. 75). As such, the requirement focuses on the sensitivity of the information, which is stated in *Sherman Estate* at paragraph 76 as follows:

> *[76] … Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.*

[44] The threshold set by the Court is high. At paragraph 63 of *Sherman Estate*, the Court states that "… an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases." At paragraph 74, it states that this is only when "… the sensitivity of the information strikes at the subject's more intimate self." In addition, at paragraphs 63 and 75, the Court explicitly states that embarrassment and shame are insufficient to meet the first branch of the test. This threshold of sensitivity distinguishes between information that is "deserving of public protection" and information that is not. This is a distinction that the Supreme Court of Canada has qualified as critical to the assessment (see *Sherman Estate*, at para. 78).

[45] I find that the grievor has failed to show that the information contained in the original decision was so sensitive as to rise to the level of "biographical core" information. In fact, the grievor does not even allege as much; rather, she alleges the following:

- The decision reports extensive information about her and her family.
- The decision goes beyond what was necessary to report.
- The decision would allow people to identify the place of worship that she attends and the school that her children attend.
- Together with the findings of credibility reported in the decision, the information about her and her family would pose a risk to her family.

[46] The grievor's allegations do not address whether the information reported in the decision constitutes highly sensitive or intimate details about her or her family, which she is required to demonstrate to meet the requirements of the *Sherman Estate* test.

[47] Judicial and administrative decisions, such as this one from the Board, often report personal information, sometimes even extensive personal information, about the parties. At paragraph 74 of *Sherman Estate*, the Court stated, "Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play." At paragraph 76, the Court reminded that court files often contain personal information that in itself is insufficient to meet the threshold necessary to limit court openness.

[48] The information the grievor seeks to protect is the following:

- details about her disagreements with a family member and a falling out with another family member about religious observance;
- details about her religious observance;
- information about the neighbourhood she lives in; and
- information that would permit the identification of the school that her children attend and the place of worship that her family attends.

[49] The grievor has failed to demonstrate or even allege that this information is biographical core information of her and her family; in other words that it contains intimate or personal details about her and her family.

[50] Whether the information reported in a decision goes beyond what is minimally necessary to support findings of fact is ultimately unhelpful in determining whether that information relates to somebody's biographical core. It is the sensitivity of the information that must be assessed.

[51] The grievor does not allege that the choice of her place of worship or of the school in which she enrolls her children are intimate or personal details that constitute highly sensitive information. Rather, she suggests that someone may infer from the decision her place of worship or her children's school. Clearly, such information does not relate to one's biographical core but rather refers to the conduct of one's public life.

[52] The argument that the grievor raises appears, in essence, to be premised on reputation rather than on dignity. She submits that together with the findings of credibility about her, the information about her and her family reported in the decision would pose a risk to their dignity; however, the test with respect to dignity is whether the information consists of details of an intimate or highly sensitive nature that strikes at an individual's biographical core. The assessment focuses on the information itself and what it reveals about a person's biographical core. The mere reporting of findings of credibility in the decision is not determinative of the sensitivity of other information about the grievor and her family that is reported in the decision. Information is either highly sensitive intimate personal details that relates to one's biographical core, or it is not.

[53] The findings of credibility about the grievor that are reported in the decision cannot be highly sensitive merely because they are unfavourable to the grievor.

[54] The grievor submits *Grievor X* as an authority for protecting information, noting its treatment of the Canadian Judicial Council's guidelines entitled, "Use of Personal Information in Judgments and Recommended Protocol", at paragraph 105, which states as follows:

> *[105] The protocol identifies different levels of protection, depending on the type of personal information. At the high protection end is personal information with a high privacy value such as birth dates, social insurance numbers and financial account information. This kind of information should never appear in a decision unless absolutely necessary. The second level includes less direct personal identifiers such as names of family members, coworkers, community and recreational groups, addresses and geographical locations. The protocol indicates that this kind of information should not be published unless it is "material to a reasoned award".*

[55] I note that both *Grievor X* and the Canadian Judicial Council guidelines in effect at the time predate *Sherman Estate*. *Grievor X* reported Grievor X's alcohol abuse issues as well as those of a family member. It is recognized that stigmatized medical conditions generally relate to a person's biographical core. Although the Board in *Grievor X* stated that the protection of third parties in proceedings before it justified the anonymization order in that case, this statement must be understood in the context of the specific biographical core information reported in that decision at paragraph 109, which stated as follows:

> *[109] So too, although to a lesser extent, would another member of the grievor's family be identifiable. Evidence about the grievor's alcohol abuse necessarily appears in the decision, as it was a frequent aspect of his recorded interactions with the police. To determine the just and appropriate outcome of the grievance it was important to consider whether the grievor had taken steps or indicated an intention to take steps to deal with his alcohol abuse. The only evidence provided on that issue centred on another family member and his history with Alcoholics Anonymous; the grievor's only connection to AA was as a support person to this family member.*

[56] The grievor in this case seeks to protect the information of third parties; however, she failed to demonstrate that the information in question relates to the biographical cores of those third parties. In *Grievor X*, the personal information about the third party related to highly sensitive information that consisted of details of an intimate or personal nature concerning that third party. This is markedly distinguishable from the type of information for which the grievor claims protection.

[57] In light of my finding that the information that the grievor seeks to protect does not constitute highly sensitive, intimate, or personal details that relates to one's biographical core, I find that she has not shown that the important public interest of protecting personal dignity, as recognized in *Sherman Estate*, has been engaged. As such, I need not address whether the grievor has shown that it faces a serious threat.

[58] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[59] The grievor's request to not make the original decision available to the public is denied.

June 13, 2023.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board